UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CENTRAL ILLINOIS MANUFACTURING CO., INC.

and Case 33-CA-12009

CENTRAL ILLINOIS LABORERS' DISTRICT COUNCIL, LABORERS INTERNATIONAL UNION OF NORTH AMERICA

Sang-yul Lee, of Peoria, IL., appearing for the General Counsel.
Meyer, Capel, Hirschfeld, Muncy, Jahn & Alden, P.C., by *Lorna K. Geiler*, of Champaign, IL, appearing for the Respondent.

DECISION

Statement of the Case

WILLIAM J. PANNIER III, Administrative Law Judge: I heard this case in Peoria, Illinois, on July 24 and 25, 1997. On February 20, 1997, the Regional Director for Region 33 of the National Labor Relations Board, herein called the Board, issued a Complaint and Notice of Hearing, based upon an unfair labor practice charge filed on November 21, 1996,[1] alleging violations of Sections 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. Sec 151 *et seq*., herein called the Act. All parties have been afforded full opportunity to appear, to introduce evidence, to examine and cross-examine witnesses, and to file briefs. Based upon the entire record, upon the briefs which were filed, and upon my observation of the demeanor of the witnesses, I make the following findings of fact and conclusions of law.

I. The Alleged Unfair Labor Practices

A. Introduction

This case presents issues concerning motivation for discharges of three employees: line mechanic Jerald Rexroad and maintenance man Jerry Riley on October 14, and assembly line worker Kelly Ensign on October 25. The General Counsel alleges that all of those discharges had been motivated by each alleged discriminatee's support for, and activities on behalf of, Central Illinois Laborers' District Council, Laborers International Union of North America, herein called the Union, an admitted labor organization within the meaning of Section 2(5) of the Act.

Central Illinois Manufacturing Co, Inc., herein called Respondent, is the employer which discharged those three employees. At all material times, it has been an Illinois corporation, with an office and place of business at a four-building complex in Bement, Illinois, and has been engaged in the manufacture of fuel filters, hydraulic filters and related equipment. It admits

[1] Unless stated otherwise, all dates occurred during 1996.

that, at all material times, it has been engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act, based upon the admitted facts that, while engaged in the above-enumerated business operations during calendar year 1996, it derived gross revenues in excess of $1 million and, also, purchased goods and materials valued in excess of $50,000 which it had received at its Bement facility directly from suppliers located outside of the State of Illinois.

Respondent denies that union support and activities had motivated the discharge of any of the alleged discriminatees. Rather, it contends that it had discharged each of them because of misconduct, consistent with its policies concerning employee discipline. More specifically, it contends that it discharged Rexroad solely because it believed that he had stolen company tools: 12 end mills and calipers. It contends that it discharged Riley for no reason other than his unauthorized departure from work one day, without having first notified his supervisor that he was leaving and, moreover, without having clocked out, so that Respondent would not be obliged to pay him for the time that he was not working. Finally, Respondent contends that it terminated Ensign only because, on October 25, she had been late for work without having notified Respondent of her intended lateness sufficiently in advance of her scheduled 5:30 a.m. starting time, as required by Respondent's rules and in the face of prior discipline concerning such infractions.

As to those discharge reasons advanced by Respondent, during April, before the Union began campaigning to represent Respondent's employees, so far as the record discloses, Respondent published and distributed to its employees an "EMPLOYEE HANDBOOK." Several of its provisions are significant to the issues posed by the Complaint. One pertains to attendance:

> The Company and all the people with whom you work, depend on each member playing his part on the team. Therefore, it is very important for you to be regular and punctual in your attendance at the Company. If you are prevented, through illness or any other cause, from coming to work, the Company needs to know this as soon as possible and you should advise the Personnel Department by telephone <u>30 minutes prior to your scheduled arrival time at the Company</u> so that the necessary arrangements can be made to cover for your absence. [Underscoring supplied.]
>
> Failure to properly notify the Company of an absence, or absenteeism or tardiness that is unexcused or excessive in the judgment of the Company is grounds for disciplinary action, up to and including dismissal.

Prior to publication of this rule, apparently only 15 minutes prior notification had been required.

There is no written policy concerning what employees must do when leaving the premises during the workday. Respondent's officials testified that, before doing so, an employee has to notify his/her supervisor and punch out on one of the timeclocks, punching back in upon return. Alleged discriminatee Rexroad agreed: "It was custom that, customary to notify your supervisor and punch out." Charles E. Foran, a machinist and tool maker at the time he left employment with Respondent in June, before the discharges, was called as a witness for the General Counsel. He testified that Respondent allowed employees to leave during the workday to run personal errands. "The only thing is you clocked out" when leaving, he testified. Although he did not recall if the employees had been "told specifically" that permission of a supervisor also had to be obtained, he added, "it's the right thing to do."

The employee handbook contains a section entitled "**Disciplinary Guidelines**." To the extent pertinent here, for attendance "policy on failure to notify in one calendar year," the handbook specifies a verbal warning for a first offense, a written warning for a second, a one-day suspension without pay for a third offense, and discharge for a fourth one during that period. "**Walking Off Job**" is one infraction for which "Discharge" is listed as the discipline for a first offense. So, also, is discharge listed for a first offense involving, "**Theft or criminal defacing or destruction of Company property**." As will be seen, each of these disciplinary measures was applied in connection with the discharges of the alleged discriminatees.

Turning to another subject, as will be seen in succeeding subsections, the two principal officials of Respondent who were involved in events leading to the terminations of Rexroad and Riley were Human Resources Manager Cheryl Smith, who also was involved in events leading to the termination of Ensign, and Maintenance Supervisor Lyle W. Murdock. Prior to the discharges, both had begun working for Respondent relatively recently. Murdock, the immediate supervisor of Rexroad and Riley, had started work for Respondent on July 20. Smith began employment with Respondent on September 23. After working on that day and during the succeeding three days, September 24 through 26, she was on leave for her wedding and honeymoon until Monday, October 7, when she resumed working. It is admitted that at all material times since having begun work for Respondent, Murdock and Smith had been statutory supervisors and agents of Respondent.

Certain other officials of Respondent are also mentioned in connection with events which have given rise to this proceeding. James Ayers is Respondent's president, having succeeded his brother William in that position during late 1995. There is no evidence that William Ayers had been involved in any of the events encompassed by the Complaint. Thus, Respondent denied that William Ayers had been a statutory supervisor or its agent at times material to this proceeding. Conversely, it admitted that at all material times James Ayers, a lawyer who maintains an office in a community near Bement, had been a statutory supervisor and agent of Respondent.

Also mentioned is Vicki Conlin whom the Complaint alleged to hold the position of supervisor and whom witnesses identified variously as head of production and as plant manager. She was Ensign's supervisor during October. It is admitted that at all material times Conlin had been a statutory supervisor and agent of Respondent.

No supervisory and agency allegations were made concerning Charlotte Pierce. As will be seen in subsection C, below, she was a central person in the events leading to Rexroad's termination. She worked continuously for Respondent from August 26, 1984 until September 5, 1997, when she was terminated. During her last six years she had worked as a tool and die maker and, in addition, during April of 1996 had been appointed supervisor for the tool and die room.

As a result of rotator cuff surgery, Pierce had been assigned desk work on May 25 or 26. She spent the entire period of her remaining employment with Respondent at that desk job, logging in information and preparing purchase orders. On September 5 she tendered her resignation as supervisor, she claimed, because she did not want to be loyal to Respondent during the then-ensuing union campaign and wanted to vote in the representation election, presumably for the Union. Within approximately an hour of doing so, Pierce testified, she had been terminated as tool and die maker, thereby concluding her employment with Respondent. However, there is no allegation that Pierce had been unlawfully discharged by Respondent.

When the hearing commenced, over objection the General Counsel was allowed to amend the Complaint to add Richard Ayers as an alleged statutory supervisor and agent of Respondent. Asked for Richard Ayers's title, Counsel for the General Counsel responded that he believed Ayers to be "the Chairman and owner" of Respondent. Respondent denied all of those allegations concerning Richard Ayers. The evidence discloses that he is the parent of William and James Ayers and, further, that he had been Respondent's founder. However, there is no evidence that he is either Respondent's chairman or its owner. Apparently, he was retired by the time of the events underlying the Complaint.

Even so, Richard Ayers maintains an office at Respondent. He comes to Respondent's facility, Murdock estimated, "[a]t least two or three times a week," for "maybe ten minutes a day," Smith estimated. While there, Richard Ayers talks to managers and supervisors. Murdock testified that he is spoken to by Richard Ayers about his supervisor's duties. Moreover, Murdock acknowledged that prior to the representation election, Richard Ayers had given a speech to Respondent's employees concerning the then-pending election. However, Murdock was unable to provide details regarding that meeting, and what had been said during it by Richard Ayers, because he (Murdock) had continued working while the meeting progressed and had not attended it. Interestingly, the General Counsel neither called nor questioned any employee who had attended the employee-meeting addressed by Richard Ayers. More importantly, perhaps, there is no allegation that anything said during it by Richard Ayers had violated the Act. Nor is there any basis for inferring that Richard Ayers had said anything during that meeting which rises to the lesser level of pre-election conduct which is objectionable.

B. The Union's Campaign

Aside from what the alleged discriminatees had done in connection with it, the evidence is sparse concerning the Union's campaign. The parties stipulated that a representation election had been conducted at Respondent on October 4. However, there is no evidence as to when the preceding campaign had been commenced. It must have been in progress by the latter half of July, since Murdock testified that he had become aware that it was in progress shortly after he began working for Respondent on July 20. Seemingly the Union did not prevail in the representation election, but investigation and resolution of objections in connection with it did not lead to certification of its results until early 1997. Thus, despite the election's results, it could not be said with certainty by the parties during October that there would not be a second election, should merit be found concerning at least some of the objections.

The General Counsel speculates that, because of maintenance duties which obliged them to move throughout Respondent's facility, Rexroad and Riley would be viewed as likely prime activists for the Union. That could be plausible, but there is no evidence concerning the pre-election activities of Rexroad and Riley on behalf of the Union in comparison with those of other employees of Respondent.

Rexroad and Riley, as well as Ensign, testified to having attended meetings conducted by the Union at a lounge located about a half-mile from Respondent's facility and, moreover, Rexroad testified that he had attended a Union-sponsored picnic at the home of employee Rita Blair. Yet, there is no evidence that Respondent had been aware of those functions nor, more importantly, that it had known that Rexroad, Riley or Ensign had attended any one of them. In addition, each of the alleged discriminatees testified to have occasionally worn while working shirts bearing the Union's insignia. However, "a lot of people" at Respondent had worn those shirts, Riley testified.

Still, Respondent did not contend generally that none of its officials had been aware of the shirts worn by Rexroad, Riley and Ensign. Nor, in the final analysis, did Respondent actually contend that none of its officials had been aware of those three employees' support for the Union. To the contrary, not only did Rexroad serve as the Union's observer during the representation election, but it is undisputed that prior to the election Rexroad had twice discussed his intention to serve as observer for the Union with James Ayers. Thus, approximately a week before the representation election, Rexroad discussed his concern about job security with James Ayers and mentioned in doing so that he (Rexroad) would be serving as the Union's observer. Then, approximately three days before the election, Rexroad reminded Ayers of his (Rexroad's) intent to serve as the Union's observer during the election.

During the later conversation, Ayers promised to take care of having Rexroad's timecard punched out at 3:30 p.m. on October 4, since the election would not conclude that day until 4:30 p.m. On Monday, October 7, however, Rexroad discovered that his timecard had not been punched out on October 4. Apparently, some malevolent intention is supposed to be inferred from those facts. However, the fact that the card was not actually punched out on October 4 does not mean that Ayers somehow had been setting up Rexroad for termination. There is more than one method for "taking care" of recording an employee's scheduled departure time. In fact, there is no allegation that Respondent had violated the Act by not ensuring that Rexroad was punched out on October 4. Beyond that, when Rexroad approached Murdock about the subject, the latter wrote on the card 3:30 p.m. and initialed it without, so far as the evidence shows, any question being raised about doing so. Furthermore, it cannot be overlooked that Rexroad acknowledged that, during his first above-described conversation with James Ayers, the latter had said specifically that there would be no hard feelings and no "reprimands for anybody that is with the Union," regardless of the election's results.

Both Riley and Rexroad testified to discussions at work with other employees about the Union. For example, Riley testified that, during break and lunch periods, he had told "several people" that, "I thought it would be a good idea and everything." Murdock testified initially that, while he had assumed that Rexroad supported the Union, "Riley professed that he was anti-union." However, Murdock never claimed that he had believed those professions. Nor could he have done so. For, he conceded that he had been one of two supervisors who had orally reprimanded Riley in response to employee complaints about Riley's purported harassment of them to see the Union's side. Interestingly, the General Counsel earlier had asked Riley if he ever had been spoken to by management regarding harassment of employees about the Union. "No," Riley answered.

It is in connection with Riley's support for the Union that evidence was adduced concerning three conversations, one with Smith and another with Richard Ayers which led to a post-election conversation between Riley and James Ayers. In connection with becoming Respondent's human resources manager, Smith testified that she had tried to conduct one-on-one meetings with each of Respondent's employees. Some were conducted during the four September days that she worked, before going on leave. In fact, Smith acknowledged that Ensign had been the first employee with whom she had conducted such a meeting and that she had met with Riley, for a one-on-one meeting, during September.

Smith testified that not one of the employees with whom she had met during September had mentioned the Union, though "[a]fter the election was over," she testified, some had told her about their opinions of the Union. More specifically, she denied expressly having spoken with either Ensign or Riley about the Union during her pre-election one-on-one meetings with them. As to Riley, Smith supported her denial by testifying that she had referred to her notes of her meeting with him and that those notes contained no mention of the Union during her one-

on-one meeting with Riley. According to Smith, a discussion of the Union, had it occurred during that meeting, would have been mentioned in her notes concerning the meeting.

Riley, however, testified that prior to the election Smith had asked if he ever belonged to a union. When he answered that he had, testified Riley, Smith had asked "how did I like it? And I told her it had its ups and downs." Of course, that account pertains to unions in general, not to the Union, in particular. Smith denied having put those questions to Riley. There is no allegation of unlawful interrogation of Riley by Smith.

Undenied is Riley's description of an exchange with Richard Ayers on the day after the election: Saturday, October 5. According to Riley, he had approached Ayers that morning, as the latter stood by his car, and had offered to shake hands "to congratulate him on his victory." But, Ayers refused to shake hands and snapped, "I want to see you in my office Monday morning and I mean the first thing Monday morning." When Riley asked what he had done, Richard Ayers twice retorted slowly, "oh, what did you do," got in his car and drove off.

Concerned about what might happen to him, Riley went to see James Ayers, at the latter's law office, at the end of the workday. As to their conversation, Riley testified, "I told him … what his dad had told me. And he told me, he said, don't worry about dad. Dad doesn't run the business, I do. He said, go on back to work Monday morning and don't go to his office." On Monday, October 7, Riley did as instructed by James Ayers and nothing was said to him by Richard Ayers about not having shown up.

The final illustration of Union-related activity, for purposes of this subsection, pertains to a handbill entitled "Who wants a union?" That handbill was prepared by the Union. In it were photographs of several employees and, alongside each, a statement of that individual's asserted reason for wanting to become unionized. For example, next to Rexroad's photograph appears the statement, "JOB SECURITY." His wife's photograph also appears in the handbill and alongside it the statement, "For my family and our future." By-then former tool and die supervisor Pierce's photograph also appears, next to the statement, "I want fair treatment and my job back!" Also appearing in the handbill is a photograph of Ensign. "Once the Union comes in my opinion will be heard and answered," is stated next to that photograph.

In the handbill there is no photograph of, nor accompanying endorsement of the Union by, Jerry Riley. But there are photographs of, and accompanying statements by, several of his family members: his wife, Beverly; his niece, Crystal; and, his sister-in-law, Diane. In addition to these relations, his son Todd, his daughter-in-law Sandra, and his stepson Anthony also work at Respondent. None of their photographs or statements appear in the handbill.

The evidence regarding distribution of the handbill is sketchy. Rexroad testified that he had seen people distributing "it to us as we walked in the door." He testified at first that the handbill had been distributed "that morning" of the election, but later retracted that testimony and, in the end, testified that it had been before that day. Jerry Riley was not asked about the handbill's distribution and, presumably, was not involved in any activity in connection with it. Ensign, however, testified that it had been distributed "out in front of" Respondent, "I think it was on the Thursday before the election. It might have been Wednesday."

There is no direct evidence – that is, evidence which "if believed by the trier of fact, will prove the particular fact in question without reliance upon inference or presumption." *Randle v. LaSalle Telecommunications, Inc.*, 876 F.2d 563, 569 (7th Cir. 1989); See also, *Hunt-Golliday v. Metropolitan Water*, 104 F.3d 1004, 1010 (7th Cir. 1997) – that any of those handbills had been given to any of Respondent's officials or supervisors. Nor is there direct evidence that any

official or supervisor of Respondent ever had seen any of them. Still, the evidence does show that the handbills had been distributed at Respondent's facility and neither Murdock nor Smith denied having seen one of them or, at least, having been made aware of their contents by the times of the allegedly unlawful discharges. Yet, it should not be overlooked that, for all the argument made about Respondent's likely belief that Rexroad, Riley and Ensign were Union activists, there is no evidence that any one of the three alleged discriminatees had been employees who had distributed the handbills.

C. The Discharge of Jerald Rexroad

As set forth in subsection A above, both Rexroad and Riley were discharged on Monday, October 14. Smith testified that she, alone, had made the decisions to terminate each of them, although she had cleared those terminations with James Ayers and counsel before implementing them. The General Counsel appears to place some weight upon that latter action as evidence of unlawful motivation, perhaps as evidence that Smith had not actually been the official who had made those discharge decisions. Yet, at the time of those discharges, as pointed out in Section B above, objections to the election had been pending investigation and resolution. Moreover, Smith had been a newly hired human resources manager. Given those facts, it hardly would be surprising for such an official to at least touch base with her superior and with counsel "to ensure the propriety of … personnel action" she intended to take, *Koronis Parts, Inc.*, 324 NLRB No. 119, slip op. JD at 40 (October 10, 1997), and case cited therein, in circumstances where her decisions might subject Respondent to adverse legal consequences. "No inference of guilt can be drawn from awareness of one's legal obligations; to do so would be to promote the ostrich over the farther-seeing species." *Partington v. Broyhill Furniture Industries, Inc.*, 999 F.2d 269, 271 (7th Cir. 1993).

Smith was uncertain which of the two alleged discriminatees had been discharged first on October 14. But, Murdock recalled that Riley had been fired after Rexroad. The latter had worked continuously for Respondent since May 17, 1982. He had been hired as a welder and, he testified, approximately two years later had been transferred to maintenance where he worked for about a year and a half, after which, "I went to the tool room as a machinist. And I worked that for approximately four years." As will be seen below, that transfer to the tool room and his work there for approximately four years during the late 1980s is a significant fact. By the time of his discharge Rexroad again was working in maintenance.

Rexroad had an unblemished employment record. He had received no discipline prior to October 14. Still, Smith testified that she "decided that Jerald had taken Company property and that he should be terminated for theft." Even an unblemished employment record does not preclude an employee from discharge for theft under Respondent's disciplinary guidelines described in subsection A, above. Rather, under those guidelines a first offense for theft warrants the penalty of discharge.

In argument, much is made of the fact that Respondent has not shown that it ever had discharged an employee for a first offense of theft in the past. But, such an argument reverses the burden borne by the parties. "The burden of establishing every element of a violation under the Act is on the General Counsel." *Western Tug & Barge Corp.*, 207 NLRB 163, fn. 1 (1973). With regard to the indicium of disparate treatment, it is not respondents who bear the burden of establishing that they have not acted disparately. It is the General Counsel who bears the burden of showing that there has been disparate treatment between the handling of the situation at issue and prior identical, or at least sufficiently similar, situations.

Beyond that, "[a]n essential ingredient of a disparate treatment finding is that other employees in similar circumstances were treated more leniently than the alleged discriminatee was treated." (Citation omitted.) *Thorgren Tool & Molding*, 312 NLRB 628, fn. 4 (1993). Here, no such showing has been made. Indeed, so far as the evidence shows, the situation pertaining to Rexroad had been the first time that Respondent had encountered discipline of an employee for suspected theft. If so, it would not be surprising that there was no evidence of prior terminations for a first offense of theft or suspected theft. In any event, there is no evidence that Respondent handled the theft accusations against Rexroad less leniently than prior situations involving an identical, or similar, offense.

Because it focuses various related facts more centrally than would be the fact by proceeding otherwise, the end of the story relating to Rexroad, the termination meeting on October 14, is best described first. That meeting was attended by Rexroad, Murdock and Smith. She began it by asking if Rexroad had taken from the tool room some "metal cutting tools," as described by Rexroad, or "tooling and a set of calipers," as described by Smith. Rexroad had done so, as discussed below, and he admitted as much to Smith. He testified, "I tried to explain to her that they were tools that the tool room supervisor [Pierce] had bought to replace the personal tools that she had used out of my tool box," and "that it was Company policy to replace your tooling as it is yours, that it broke, wore out." "I kept getting interrupted," he testified, as he had been trying to explain that to Smith. However, his description of the meeting was disputed both by Smith and Murdock.

Smith testified that, "He said they belonged to Charlotte. And I said, who told you that they belonged to Charlotte? And he said, Charlotte." That account was buttressed by Smith during her cross-examination:

> Q Now, when you terminated Mr. Rexroad on the 14th, Charlotte's name came up in that conversation, didn't it?
>
> A Yes. It did.
>
> Q In fact, Mr. Rexroad claimed that the tools had belonged to Charlotte at one point, is that correct? [Underscoring supplied.]
>
> A Yes.

In other words, although Rexroad claimed that he had told Smith and Murdock that the tools belonged to him, Smith testified that Rexroad had said, at least at one point, that they belonged to Pierce and the portion of the question underscored above appears to adopt Smith's testimony.

The meeting continued with Smith asking where the items were. Rexroad said that the end mills – the "metal cutting tools" or "tooling" – were in his truck and that the calipers were in the maintenance room tool box. Smith said that Respondent was terminating Rexroad for theft, but would not pursue criminal charges against him if he signed a statement admitting that he had stolen and returned the items. She presented him with a typed, two-paragraph statement. The first paragraph states, "I Jerald Resroad admit freely that I in fact stole the items listed below that are the property of CIMCO. I am returning said property." The second paragraph reads, "In exchange for returning this property. [sic] CIMCO agrees not to prosecute me for theft."

Eventually, Rexroad did sign the statement. Smith testified that he had been "unhappy" at having to do so. Murdock and Rexroad testified that the latter had first refused to sign the statement. However, Rexroad testified that he had decided to do so because "if I didn't they were going to have me taken to jail. And I didn't want to go to jail. And I was scared. And I wasn't going to go." That testimony is the basis for an argument that his signature on the statement should not be accorded weight as an admission. In fact, I felt that, as to that point, Rexroad likely was being truthful and, accordingly, I accord no weight to the fact that he signed the statement which Respondent had prepared, under threat of criminal prosecution.

After he signed the statement, Smith asked Rexroad to produce the end mills and calipers. Accompanied by Murdock, Rexroad went to his truck from which he produced 12 end mills, Murdock testified, "from underneath the front seat," and, then, went to Building C where he produced the calipers from, testified Murdock, "a maintenance cabinet." The two men returned to the office and those items were given to Smith who listed them on the statement which Rexroad had signed, below his signature.[2]

It is not disputed that Respondent had purchased both the 12 end mills and the calipers which were produced on October 14. Also undisputed is the evidence that, in addition to using tools owned by Respondent, its employees also use in their work tools which they own. Moreover, whenever those personal tools become damaged or worn out, Respondent will pay to have them refurbished or replaced. That is essentially the basis of Rexroad's position concerning the end mills taken from his truck on October 14: while those end mills had been purchased by Respondent, they had been purchased to replace ones which he had owned and which had become damaged. Of course, that is at odds with a statement to Smith on October 14 that the end mills belonged to Pierce.

Still, it seems uncontroverted that maintenance employees, such as Rexroad, use end mills in the course of their work for Respondent. He testified that he had owned none when he began working for Respondent and that he had not needed any while working as a welder. However, testified Rexroad, when he became a machinist he began purchasing and trading for end mills, since he used them in the performance of his duties. For example, Rexroad testified, "I started buying end mills when I first, went to the tool room back in, oh, let's see. I worked in welding about three years. About '85." He further testified that he owned between 20 and 30 end mills.

Once Pierce began working for Respondent as a tool and die maker, she needed to use end mills for cutting and fabricating metal. She and Rexroad are romantically involved and, having none which she owned, she began to borrow the end mills which Rexroad testified that he had acquired through purchase and trade. She testified that, through use, those end mills had become worn and damaged to the point where they could not be refurbished. So, as tool and die room supervisor, she ordered "seven or eight" end mills to replace the worn and

[2] End mills are similar in appearance to drill bits. The size of one of them was incorrectly recited by Smith on the statement which Rexroad had signed. That is an inconsequential fact, however, given the undisputed fact that 12 end mills were handed over by Rexroad that day and that, at least at that time, Smith was unfamiliar with what end mills were. There is no basis for concluding that Respondent had anything to gain by misstating the size of one end mill which Rexroad had produced from his truck. Nor is there any basis for concluding that Smith had anything to gain by writing down an incorrect size for one of them. So far as the record discloses, her misstatement of that one end mill's size had been nothing more than a simple mistake.

damaged ones owned by Rexroad. In fact, she claimed that she had "ordered a set for each person in the tool room."

According to Pierce, she had placed that order for Rexroad's end mills – and, presumably, for the other sets, as well – "back in April, May" and it had taken "[t]wo to three weeks" for them to arrive. When they did arrive, testified Pierce, she had shown Rexford that his replacement end mills "had come in and he put them in his tool box." Despite her assertion that she had "ordered a set [of end mills] for each person in the tool room," inexplicably she apparently had not ordered a set for herself. So, she resumed borrowing the ones in Rexroad's tool box: "I used them every day in the die work that I did," Pierce testified. In contrast, to her knowledge, she testified, Rexroad had never used those new end mills.

Then, Pierce testified, Charles E. Foran had been transferred from second shift and, to supply him with end mills, she gave him the set which had been given to John Lareau. Thus, Pierce testified, "I had given John's to Charlie Foran. And then I had to re-order some more. So I gave the tools that I had of Jerald's to John and re-ordered another set." But, neither Foran nor Lareau, both of whom appeared as witnesses, the former for the General Counsel and the latter for Respondent, corroborated that testimony by Pierce. She estimated that "[I]t might have been three weeks later" that she reordered end mills after having placed the initial order for Rexroad's replacement end mills.

Pierce did not testify when those reordered end mills had arrived. She did testify, however, that by the time they had arrived, she had been assigned to desk work due to her rotator cuff surgery, as mentioned in subsection A, above. So, she testified, "I told [Rexroad] the new ones came in to replace the ones I gave John. And I had put them in the file cabinet cause I did not have my keys to his tool box with me." Pierce testified that she did not again speak to Rexroad about the end mills until "[a]pproximately two weeks" after she had been terminated on September 5. At that time, she testified, "I had told him that I had left his end mills in the file cabinet next to my work bench and that he should get those." "He just said that he would," testified Pierce.

End mills were not the only items that Pierce claimed to have told Rexroad that he could pick up. She testified that, when she had worked in the casting area, Respondent had supplied her with a set of calipers, but those eventually broke. She borrowed calipers from Rexroad which also then broke. So, she testified, she had Respondent order calipers to replace the ones owned by Rexroad which she had borrowed and broken. When they came in, Pierce testified that she had placed them in the company tool box which she was using. Then, when she later told Rexroad to pick up the end mills, Pierce testified that she also "told him to pick up his calipers." Shown the calipers that Respondent had received on October 14 from Rexroad, who got them that day from "a maintenance cabinet" in Building C, Pierce claimed, "These were replacement calipers of the set I had broke of Jerald's."

In fact, Rexroad not only contradicted that testimony about ownership of the calipers which he had handed over on October 14, but he also did not corroborate Pierce's testimony that those calipers had been purchased to replace the ones which belonged to him and which Pierce had purportedly broken: "I wasn't aware that she had purchased a pair of calipers on my behalf. It was my understanding that they were digital, but they were the Company's. I mean, because the ones that she had, mine that she had broke were not as expensive as what these are." Nor is that the lone instance when Rexroad's testimony was at odds with that of other witnesses.

Not until Thursday, October 10 did Rexroad choose to pick up the end mills and calipers from the tool room. The fact that he had been working for over a month without seemingly having used the end mills, of course, is some evidence that he had not been using end mills in performing his maintenance duties during the over one month since Pierce had been terminated. Obviously, Rexroad also had not been using those calipers during that slightly more than one month period. In fact, he never did explain with particularity what specific tasks on October 10 had led him to pick up the calipers which he conceded belonged to Respondent, but which Pierce claimed should be regarded as belonging to Rexroad since they assertedly had been ordered to replace ones which he had owned and she had broken.

When Rexroad did pick up the end mills and calipers from the tool room, he testified, "Dean Kopp and John Lareau" had been there. Rexroad denied that he had any conversation then about the end mills and, as to the calipers, testified, "I asked John where the extra set of dial calipers were that Ms. Pierce used to have that belonged to the Company so I could take them across the street to use in my maintenance over there." Rexroad did not explain why he would have purportedly said specifically "that belonged to the Company" when asking about the calipers. In the final analysis, that portion of this account seems to have been a none-too-subtle means of fortifying his explanation about what he had said to Lareau that day. For, there is a dispute about what he had said to Lareau about those calipers, when asking for them.

Both Kopp and Lareau were called as witnesses. Although they were called as Respondent's witnesses, no evidence was adduced even indicating that either man had been opposed to the Union nor, for that matter, were antagonistic toward Rexroad. Kopp testified that Rexroad had come regularly to the tool room and, when he had done so, sometimes had picked up tools stored or located there. On the day Rexroad asked about the calipers, Kopp testified,

> Jerald come [sic] in the tool room and he was looking at a whole tool box there on the bench. And I asked him what he was looking for and he said, a set of calipers. And I said, well, you can use mine. And he said, no, I'm looking <u>for Charlotte's</u>. And then he went to a file cabinet and opened it up and took out a sack of tooling and walked on around the cabinet and went and talked to John Lareau. [Underscoring supplied.]

Similarly, Lareau testified that Rexroad had asked "if I knew the whereabouts of Charlotte's calipers," and Lareau replied that he "had them, but I was under the understanding that they belonged to the Company." According to Lareau, Rexroad said, "no they belong to Charlotte and she said that he could use them." Lareau then surrendered the calipers to Rexroad.

Called as a rebuttal witness, Rexroad did not dispute the above-quoted description of his words that October day which Kopp had provided. He did dispute Lareau's version, testifying, as he had when called during the General Counsel's case-in-chief, that he had asked Lareau "where the calipers was [sic] that Charlotte used in her work." Asked if Lareau had questioned why he wanted the calipers, Rexroad answered, "No. I offered at the time that I wanted to take them over and put them in the maintenance tool box in Building C for me to use in my maintenance." But, Rexroad's description of what he and Lareau had said that day expanded somewhat when he was cross-examined during rebuttal.

As quoted above, during the General Counsel's case-in-chief Rexroad testified that he had asked Lareau about "the extra set of dial calipers … that Ms. Pierce used to have that belonged to the Company …." Yet, on cross-examination during rebuttal, Rexroad first appeared to be trying to avoid answering, but finally did concede, that Lareau had said that day

that he thought the calipers belonged to Respondent. "And I said, I said, they are the Company's. I just want to take them across the street and use them in my maintenance over there." Now, if Rexroad had already told Lareau, when asking initially for the calipers, that they "belonged to the Company," as Rexroad claimed when testifying during the General Counsel's case-in-chief, it seems unexplainable why Lareau would have responded, as Rexroad claimed during cross-examination on rebuttal, that he believed the calipers belonged to Respondent. That had already been said to him, if Rexroad's testimony during the General Counsel's case-in-chief is to be believed.

There is another aspect of Rexroad's rebuttal cross-examination which is worth noting. "Pretty much," he testified, on a daily basis he had used calipers while working for Respondent. However, he testified further, his own calipers were then at his home. Thus, assuming that he was testifying candidly about the frequency of his caliper usage, presumably he would have needed the calipers which he eventually sought from Lareau. Yet, as pointed out above, over a month had passed since Pierce had purportedly "told him to pick up his calipers." Rexroad never explained how he could have been using calipers "[p]retty much" on a daily basis between Pierce's September 5 termination and his October 10 visit to the tool room, when he did not have his own calipers and, obviously, when he had not been using the ones purchased by Pierce and being used in the tool room.

Also unexplained is another fact. While working for Respondent, Rexford testified, he had owned a large tool chest, on wheels or rollers, in which he maintained his personal tools, as did other maintenance employees. He testified that on a Saturday, "approximately two weeks before" his discharge, he had taken that tool chest home, because, "I no longer needed it there. And the person that was basically using my tools no longer was there." Presumably Pierce had been that "person." Now, "two weeks" before Rexroad's discharge would have occurred near the very end of September or the beginning of October. By then, according to her above-described account, Pierce had already told Rexroad about the end mills and, assertedly, also the calipers. However, he did not take those items at the time that he took his tool chest home, even though it seems logical that he would have done so, given the fact that he was also removing, with the chest, whatever personal tools he ordinarily kept at Respondent. Rexroad never explained why, when taking his tool chest, he had not also taken at least the end mills which he now claims had belonged to him.

To be sure, Respondent's defense to Rexroad's discharge was not without its own infirmities. Kopp testified that he had seen Rexroad take "a sack with the red tubes," containing end mills, from the file cabinet, but "didn't know want they was [sic]. I had no idea whether they was [sic] drills or end mills or what they was" in the sack. Yet, Kopp then testified that he had spoken with Murdock about having seen Rexroad take that sack and had asked "Murdock[ ] if there was any reason Jerald should have took the end mills out of the tool room," given the fact that "there wasn't no machines over there to use them tools." In other words, at one point Kopp testified that he had not known what was in the sack, while at another he testified that he told Murdock that Rexroad had taken end mills. Still, those two portions of his testimony are not so contradictory as they might appear at first blush.

During cross-examination, Kopp testified that the tool room employees had "tried to figure out what was missing out of the drawer." Neither side pursued that testimony further. However, it may be that by the time that Kopp spoke with Murdock, he had ascertained what tools had been taken in the sack. Furthermore, by the time of the hearing Kopp, and other witnesses as well, seemed to be aware of many facts about which they had not been aware at the time of the events which they described. That is, from the investigation and, perhaps, from trial preparation, they became aware of facts not known by them during the workweek of

October 7 through 11. As the testimony progressed, it became apparent that sometimes witnesses, and even counsel, were referring to events of that week with the benefit of hindsight, rather than confining their testimony and questioning to the facts as known then by those witnesses. Thus, I accord little weight to that seeming discrepancy in Kopp's account of the events of October 10.

What is consistent is that it had been Kopp who brought to Murdock's attention that Rexroad had removed items from the tool room. Kopp testified, "I don't remember whether [Murdock] come [sic] through the tool room or I went over to the other building and seen him." Murdock testified that his attention had been directed to the tools' removal as a result of a telephone call from Kopp. In any event, Kopp testified that he had asked Murdock if there was some reason why Rexroad would have taken them. Murdock described Kopp as having been "terribly upset" about the items' removal from the tool room and thought that Kopp had specified end mills, though Murdock allowed that Kopp may merely have said "a sack of tools."

Both Lareau and Murdock testified that, as the latter had been speaking with Kopp, Lareau had joined them and had said that Rexroad also had taken calipers from the tool room. According to Murdock, Lareau had said that he had told Rexroad not to take the calipers, but that Rexroad had done so, anyway. Lareau did not confirm that portion of Murdock's testimony.

Murdock reported to Smith what he had been told by the two tool room employees. She asked him to write a memo on the matter and, also, to obtain statements from those employees. Murdock did not testify as to what had happened when he had asked Kopp and Lareau for statements. Smith testified that Murdock had reported back that neither employee would submit a statement because they were afraid of Rexroad and, in the case of Kopp, there had been a longstanding friendship between himself and Rexroad. Of course, being someone's friend is not necessarily inconsistent with being afraid of that person.

As to the memo, it is dated October 10 and states that "DEAN KOPP AND STEVE GOLLADAY" had made the report about Rexroad's removal of "AN UNKNOWN QUANTITY OF CARBIDE CUTTING TOOLS AND A DIGITAL MICROMETER," and that, "JERALD TOLD STEVE THAT THOSE ITEMS BELONG TO CHARLET [sic]." As to carbide cutting tools, no one disputed Murdock's testimony that the term is, in effect, a euphemism for end mills. He further testified that, given the fact that he had not commenced working for Respondent until July 20 and given the over 100 employees whom it employs, he had made a mistake: when having been talking to Lareau, he thought that he had been talking to Steve Golladay. Nothing in the record would support a conclusion that the confusion in names had been anything other than the mistake of a relatively recently-employed supervisor. That is, there is no evidence showing that Respondent had something to gain in connection with this proceeding by substituting Lareau for Golladay. Certainly, the latter was seemingly as available to the General Counsel as to Respondent, had it been possible to adduce evidence of some nefarious reason for that substitution.

Smith testified that she summoned Kopp and Lareau to a meeting on Friday, October 11. Neither employee was asked to testify as to what had been said during that meeting. According to Smith, they renewed their refusals to submit statements, but did tell her what had happened during the preceding day. Her notes recite that, on October 10, Rexroad had said that the calipers belonged to Pierce, not to Respondent, and that he had taken them and, also, "a bag of tooling" from the file cabinet. It should be noted that Smith testified that, at that time, she had no idea of what end mills were. Also noted is the fact that two other employees had reported to Smith having seen "approximately 2 dozen pieces of tooling in that bag" when they "were in the bag the day before[.]"

Smith testified that she next had examined employees' inventory lists which were on file, because she had understood that employees listed tools which belonged to them, as opposed to Respondent. Actually, that was not an altogether accurate understanding. Rexroad, Pierce and former tool and die maker Foran each testified that those lists had been prepared in the early 1990s, as a result of a seeming theft of a then-employee's personal property. But, each testified, those lists were not thereafter updated. That may and may not be totally accurate.

Respondent submitted a sampling of those lists. Only one of them bears dates – that of Bruce Hammerschmidt – and those dates on his five-page list appear to be the years during which he acquired, or at least brought to Respondent, various personal tools. But, it is not a chronological list. That is, some of the years recited are "1995," but before and after some of those entries are dates from earlier years. For example, of the last seven dates set forth on page 5, there is one "1995," followed by five "1978" dates, and, finally, another "1995." Hammerschmidt did not appear as a witness, though there was neither representation nor evidence that he was unavailable to Respondent, with the result that the list, on its face, is not so helpful it might have been, had there been testimony about its preparation. Even so, the significant point about those lists is that there appears to be no dispute about the fact that the list prepared by Rexroad contains no mention of end mills, even though he claimed to have been acquiring end mills since having been transferred to the tool room as a machinist during the latter 1980s.

After participating in a conference call with counsel and James Ayers, concerning both Rexroad and Riley, Smith testified that she proceeded to implement those employees' terminations on Monday, October 14.

D. The Discharge of Jerry Riley

The motivation issue pertaining to Riley is whether he had been terminated for supporting the Union or, instead, for having left the premises during the workday without having punched out and without having notified his supervisor, Murdock, that he was leaving, as Murdock testified had occurred on Monday, October 7. In fact, Riley admits that there had been a workday during the week of October 7 to 11 when he had left work and he further concedes that he had not given notice to Murdock that he was leaving on that occasion. But, he asserts that the day during which he had done that had been Wednesday, October 9 and, moreover, he asserts that he had punched out that day before leaving Respondent's facility. As will be seen, on the back of his timecard covering that workweek, there are timeclock-markings showing that the card had been punched out and, then, back in on Wednesday, October 9.

To understand fully events underlying Riley's termination, it is necessary to review the testimony concerning uniforms and, in addition, one aspect of the timecard procedure. Some of Respondent's employees ordinarily wear uniforms while working. Those uniforms are rented from and laundered by another company whose driver comes each Wednesday to pick up uniforms worn during the preceding seven-day period and to deliver fresh uniforms for the succeeding seven-day period. To obtain fresh uniforms, employees must turn in ones which they have worn during the preceding seven-day period. As to the time on Wednesdays when uniform pick up and delivery occurs, the only evidence adduced is that it occurs around 8:00 a.m., give or take a few minutes either way. As will be seen, that evidence concerning the time became significant in connection with Riley's termination.

If there was little dispute about the uniform situation, and nothing objectively inconsistent with what testimony was provided, the same cannot be said when scrutinizing the testimony

concerning punching out and back in whenever an employee leaves work during the workday, after having already punched in and started work on such days. Foran testified, "The way our time card or the time clock worked, or at least the one we used, if you clocked out and clocked back in within about the same hour, the darn thing would punch right over the previous numbers." Similarly, Riley testified that "sometimes if you clock in and out, at the time clock they had at the time, it would actually clocked [sic] over another hour if it was a short time. If it wasn't long enough, it would just punch right over the other time."

To avoid that, testified Riley, Angie Sharp, Smith's assistant by the time of the hearing, had earlier "instructed us to clock out on the back [of the timecard] if we had to leave, you know, take the children to school or something like that." As a result, he had followed that timecard practice whenever he had to leave work briefly during workdays. Foran testified, "I think some people would punch on the back of the card" to avoid punch-overs. However, he testified that the procedure he had followed had been to "just take another time card and then slide it back behind yours and you would punch. What that, what that sort of did was to make your time card to the machine seem taller. And it would punch quicker on the card."

Facially, those descriptions seem logical. But, no timecards of Foran, showing the procedure which he claimed to have followed, were produced to support his testimony as to the procedure he assertedly had followed whenever temporarily leaving work during workdays. Of course that is not fatal to his description of his procedure. Still, suspicion about the foregoing accounts of timecard procedure is raised by examination of Riley's timecards that were received (General Counsel's Exhibit Number 4).

If the supposed problem arose whenever a timecard was punched twice during the same hour, as Foran claimed, those eight timecards for Riley reveal numerous examples of his having punched out and back in during the same hour: out at "12 .12" and back in at "12 .60" on September 4; out at "11 .33" and back in at "11 .77" on September 6; out at "12 .17" and in at "12 .67" on September 9; out at "11 .23 and in at "11 .67" on September 10; out at "11 .18" and in at "11 .53" on September 12; out at "11 .22" and in at "11 .57" on September 13; out at "11 .13" and in at "11 .55" on September 16; out at "10 .32" and in at "10 .32" on September 17; out at "11 .15" and in at "11 .58" on September 20; out at "11 .25" and in at 11 .65 on September 24; out at "11 .20" and in at "11 .60" on September 25; out at "11 .17" and in at "11. 45" on September 26; out at "11 .0" and in at "11 .38" on September 27; out at "11 .28" and in at "11 .65" on September 30; out at "11 .05" and in at "11 .45" on October 2; out at "11 .22" and in at "11 .68" on October 3; out at "11 .13" and in at "11 .57" on October 4; out at "11 .10" and in at "11 .52" on October 7; out at "11 .12" and in at "11 .48" on October 8; out at "11 .08" and in at "11 .53" on October 9; and, out at "11 .28" and back in at "11 .72" on October 10.[3] All of those times are recorded clearly and without any obliteration or diminution in readability of any one of them.

Of course, it could be that more than two timecard punches within any single hour might not yield legible recordings of the times punched. Any such inference, however, is dispelled by examination of Riley's timecard readings for September 5. Four readings within the same hour appear legibly on the front of it:

14 .87
11 .92
11 .75

[3] Respondent's timeclock records time in hundredths of an hour.

11 .47
11 .30
6 .33

Obviously, he had punched out and back in twice during the course of that workday. Yet, not only did he do so within the same hour, but he had been able to do so on the face of the timecard, not on the back as he claimed he had been instructed to do and always had done, without obliteration or diminution of the recorded times' readability.

Turning then to the events of Monday, October 7 through Monday, October 14, Riley testified that the only day that week during which he had left, after having started work, had been on Wednesday, October 9 when he assertedly had gone home to retrieve his soiled uniforms so that he could exchange them for fresh ones. At the time he left, he testified, the laundry pick-up/delivery person already had arrived at Respondent. He looked for and tried to page Murdock to get permission to leave, but testified that he was unable to speak with Murdock. Accordingly, he testified that he told Rexroad where he was going, clocked out on the back of his timecard, and went home to get the bag of soiled uniforms: "I looked for Lyle and I couldn't find Lyle. And the uniform man was there and he was about to leave. So I told Jerald Rexroad where I was going and I went and clocked out and got them."

Upon his return to Respondent, Riley testified, he encountered Murdock "at the time clock" and, "He asked me was I going to do anything. I said, yes, let me clock in. I said, I had to get my uniforms. Let me clock back in." Riley testified that he did clock back in, again on the back of the timecard, after which he dropped off the uniforms and resumed working.

Murdock testified that on Monday, October 7 he had gone looking for Riley to assign him to paint the newly moved Mary Valentine equipment, but had been unable to locate Riley. As he walked to Building C at approximately 8:45 a.m., testified Murdock, he saw Riley getting out of his car in the employee parking lot, next to the building, and waited at the "personnel pass door to the time clocks in Building C" for Riley to walk there. When Riley reached that door, Murdock testified, "I told him I had been looking for him and I wanted him to be back, I wanted [him] to go back in Mary Valentine area and paint the equipment." According to Murdock, Riley had responded, "I will just as soon as I get punched back in," and Murdock watched Riley go to the timeclock, but moved on to doing "other things," without actually noticing whether or not Riley had punched back in.

One other aspect of that encounter is significant. During direct examination, Murdock testified that when he had encountered Riley on Monday, October 7, the latter had been carrying "a brown paper bag rolled up tightly. I have no idea what was in it." He described that bag carried by Riley as "[a] brown grocery sack" that was "compressed down to about six, eight inches tall, whatever was in the bag." Murdock testified that he had not been told, nor seen, the contents in the bag. But, as described below, Murdock would report to Smith on Thursday, October 10, in a memo, that Riley had "STATED THAT HE HAD JUST RAN HOME TO GET HIS DIRTY UNIFORMS AND WOULD HAVE TO PUNCH BACK IN FIRST. (HE DID HAVE A BAG OF DIRTY UNIFORMS WITH HIM.)". That account obviously contradicts Murdock's testimony that he had not been told, during their encounter, where Riley had gone that morning and, also, his vague description of the bag.

Murdock testified that later during that same morning, "probably[ ] sometime after 10:00," he had looked at the front of Riley's timecard and had discovered that Riley had not punched out and back in earlier that morning. Murdock conceded that, at that time, he had not turned the card over and looked at the back of it. Thus, he testified, he had gone looking for

Smith who, as described in subsection A, above, had returned to work that day after her absence since September 26. According to Smith, she had first met Murdock during a managers meeting conducted earlier that same morning. Then, she testified, she had resumed conducting one-on-one meetings, as she had been doing prior to taking leave for her wedding and honeymoon. Thus, she had not been in her office and Murdock had been unable to locate her in Respondent's facility until Thursday, October 10.

Murdock's and Smith's account of the former not being able to locate the latter until October 10 is derided as somehow being illogical – as being inherently unbelievable since there were other means, such as the pager system, by which Murdock might have been able to find Smith. Probably in retrospect Murdock might agree. But, the fact is that it is undisputed that Smith had been conducting one-on-one meetings with employees both before and after her leave. Thus, she had been occupied elsewhere that in her office. There is no evidence or basis for inferring that, on any given occasion when he had attempted to locate Smith, Murdock had realized that he would not be able to make contact with her until late during the workweek – that he should begin paging her or making some other extraordinary effort to locate her. The fact that he did not eventually speak to Smith until October 10, in some circumstances, might be some indication that he had not encountered Riley returning to Respondent's facility until Wednesday, October 9. But, in the totality of the circumstances presented here, the delay is not so persuasive as is sought to be portrayed.

In a meeting on October 10, separate from the one concerning Rexroad that has been described in subsection C, both Smith and Murdock testified that the latter described what had occurred concerning Riley's unapproved departure during the workday, without having clocked out, and suggested that Riley be discharged. Significantly, Smith testified that Murdock had told her that Riley said he had gone home to get his laundry. However, she also denied specifically that Murdock had placed the time of his encounter with Riley as "sometime around 8:00, to 8:00 time[.]" Rather, she testified, Murdock had told her that he had encountered Riley at "8:45.: She also testified that Murdock had said that "he saw Mr. Riley with a brown paper bag," which Murdock had described to her as "a grocery sack, but it was all scrunched down so that there was about this much of the bag and the rest was scrunched down."

As she would do with respect to Murdock's report about Rexroad, Smith asked Murdock to prepare a memo concerning the reported infraction by Riley. That memo, quoted in part above, states that Murdock had encountered Riley "AT APPROXIMATELY 8:45 AM ON 10/07/96," and that a later inspection of Riley's timecard disclosed that he had not punched out and back in on that date, nor on any other date during that workweek. Upon reviewing that memo, Smith testified that she concluded that Riley should be terminated for two reasons: for "basically walking off the job," inasmuch as Riley had not obtained permission from his supervisor to leave, and for timecard falsification, "since Lyle said he did not punch out."

Before proceeding to terminate Riley, testified Smith, she had conferred with counsel and James Ayers about the subject, during the same telephone conversation involving Rexroad, as mentioned in subsection C. As to the purpose for that conference call, Smith explained,

> We had just gone through an election campaign and were told by attorneys that no serious consequences should happen to anyone during that campaign. We did win the election, but we weren't certified yet. And I am not really familiar with union anything. So I wanted to make sure that I could terminate an employee even though we hadn't been certified yet.

In other words, her explanation is consistent with that of any party who seeks to avoid litigation or, at least, to ensure that should litigation ensue, that party's position is as sound as possible.

As with Rexroad, the termination meeting for Riley was conducted on Monday, October 14, with Smith and Murdock, along with Riley, in attendance. When Riley was told that he was being discharged for leaving the premises during work on Monday, October 7 without having punched out, he protested that the only day that week that he had left had been on Wednesday, October 9 and, moreover, that he had punched out on the back of his timecard. That brought the meeting to a halt, as Smith left the office to obtain the timecard.

When she returned to the office, she turned the card over and on the back of it appeared the following:

OCT 9 8 .03
OCT 9 7.92

There is a dispute as to what then had been said.

Riley testified that Smith "looked at it and she looked at Lyle and she said, well, it's, he did clock out. She said, now, what are we going to do?" According to Riley, Murdock did not respond and "she excused herself and she left" the office. In a prehearing affidavit, describing that same termination conversation, Riley made no mention of Smith having asked Murdock "what are we going to do?" However, Smith did not deny having made that statement and, in effect, she acknowledged that disclosure of the timeclock recordings on the back of the timecard had led her to reflect further on her termination decision.

Smith testified that, following disclosure of the timecard readings on the back of Riley's timecard, she had left the office. But, she denied that when she had done so, she had then spoken with anyone else about whether or not to terminate Riley. Rather, she testified,

> I went to the outer HR office. I was about to terminate somebody. I wanted to make sure I had all my notes, all my ducks in a row and was doing the correct thing.
>
> So I went through my head that he had clocked out on the 9th. But Lyle saw him on the 7th. And I knew he saw him on the 7th because he had been trying to get me for three days and I was quite embarrassed. I'll never forget that.
>
> And it really didn't matter if he clocked out on the 9th. The fact of the matter was he did not clock out on the 7th. And in both instances, he left the grounds without permission from his supervisor.

But, when she told that to Riley and asked for his keys, Smith testified, Riley retorted that she could not have them and stalked out of the office, asserting, "I'm in command here. You can't tell me what to do."

Unlike Rexroad, who was called as a rebuttal witness to contest some of Respondent's testimony, Riley was not recalled during rebuttal and, thus, never refuted Smith's testimony about what he had said upon being told that he was being discharged and being asked for his keys. Nor did Riley dispute that Murdock had followed him from the office to the parking lot

where, Murdock testified, Riley took Respondent's keys from his truck, threw them at Murdock, uttered several obscenities and drove off.[4]

E. Termination of Kelly Ensign

As set forth in subsection B, Kelly Ensign was one of several employees whose photograph and pro-Union statement appeared in the handbill distributed before the October 4 representation election. Unlike Rexroad and Riley, however, Ensign had encountered work-related problems prior to that election.

She had worked continuously for Respondent since September 1, 1993, in the welding shop for almost two years and, then, on the assembly line in the main building. Prior to August she never received any warnings nor, so far as the record discloses, any other discipline. By then, however, she had developed a numbness problem with her right wrist and hand.

She received a verbal warning for failing to report for work on time and, also, for failing to notify Respondent that she would be late on August 2 and 5. On the notice of that warning, Ensign checked the box expressing disagreement with the warning and, also, wrote, "I did call but got no answer then called Mary." Presumably, she was referring to Mary Valentine, the hydrogear supervisor. The notice warned that another incident would lead to a written warning, consistent with Respondent's policy described in subsection A, above. That was not long in coming.

On August 9 a written warning issued to Ensign, again for failing to report for work on time and for failing to give the required notice that she would be late, in this instance on August 8. Again, Ensign wrote that she had gotten no answer when she had attempted to call and, in consequence, again had "called Mary." This notice warned that another incident would lead to a one-day suspension, again consistent with Respondent's policy. That occurred on August 14 when Ensign received another notice for having, "Called in 55 mins late letting us know she would not show up for work." That notice, as had been true of the preceding two notices, was issued by Plant Manager Conlin who also wrote on the August 14 suspension notice, "Company policy is 15 min. Before Shift Starts." Ensign checked that she disagreed with the August 14 notice, writing, "My hand was Swollen [and] in pain until 2:00 AM[.] I went to the dr. 8/12/96 [and] took a couple of Pain Killers and I Slept. I still Called in like I suppose too [sic]." The August 14 notice warned that "Dismissal" would result from another infraction.

Even though all of the foregoing disciplinary actions occurred after the start of the Union's campaign, given Murdock's above-mentioned testimony in subsection B, above, that he became aware of that campaign shortly after starting work with Respondent on July 20, none of the foregoing three notices is alleged to have been unlawfully motivated under the Act. Nor is it alleged that Respondent had acted out of unlawful motivation when, apparently during the workweek of October 7 through 11, it had assigned Ensign to work on the glue table. As to that assignment, Smith testified that a Workers Compensation Service nurse had determined that, due to her right wrist and hand condition, Ensign should perform "left handed work only." Because only one hand is needed for glue table work, it was to that work that Ensign was assigned.

[4] Riley later appealed his discharge to James Ayers, without result, and Respondent called the police on October 14. However, as those incidents neither add to, nor detract from, the issues concerning motivation for terminating Rexroad and Riley, they are collateral events which are not worth discussing further.

It is undisputed that Ensign told Smith that "she was bored" with glue table work. In fact, by memorandum from Smith dated October 15, Ensign was, in effect, reprimanded for not staying at the glue table. Again, there is no allegation that Smith's memorandum had been motivated by considerations unlawful under the Act.

On October 25 Ensign was scheduled to start work at 5:30 a.m. She testified that when she had awakened at 5:00 a.m. that morning, "both my hands were numb from my fingertips all the way to my elbows," and that she had stayed in bed, flexing her hands until the numbness had passed. No evidence was advanced as to why Ensign's left hand also had felt numb that morning, when only her right wrist and hand had been the problem until then.

After the numbness passed, Ensign testified, she had started trying to call Respondent to give notice that she would be late, but the first two efforts resulted in a seeming connection, followed by the phone going dead. Not until the third call, she testified, was she connected with the answering machine. She left a message that her hands were numb and that she would be late, because she still had to dress and leave her home. "It was close to about 5:20," she testified during direct examination, when she had first started to make those calls. "About 20 after, 15, 20 after," she estimated during cross-examination, as the time when she first had gotten up, because she had remained in bed trying to relieve the numbness and, "It took about 15 minutes" to accomplish that.

It is argued that obviously even Respondent's supervisors had overlooked the additional 15 minutes, implemented in the employee handbook issued during April, which had been imposed as a requirement for length of notice of lateness. That is, before April only 15 minutes was required whereas 30 minutes was required afterward. But, as quoted above, on the August 14 notice issued to Ensign, Conlin had written, "Company policy is 15 min. Before Shift Starts." However, that is hardly significant with respect to the situation on October 25. For, Ensign admitted that she had not started trying to call Respondent that day, to give notice that she would be late, until 5:20 a.m., less even than the former 15-minutes requirement supplanted by a 30-minutes requirement during April.

Smith testified that when she had arrived for work on October 25 at approximately 7:30 a.m., Sharp reported that there was a voice mail from Ensign, time stamped "5:26," that the latter would be late. According to Smith, she called Conlin, who said that Ensign was working, but had arrived late for work. Someone, she did not specify who, brought to Smith's attention that Ensign "had just come off of a one day suspension in August." Smith reviewed Ensign's personnel file, discovering the above-enumerated notices issued to Ensign within the three-month period preceding October 25. Smith agreed, during cross-examination, that she had then decided that Ensign should be terminated because she had exhausted the progressive disciplinary steps.

Later during the morning of October 25, Ensign was summoned to a meeting with Smith and Conlin. During that meeting, Ensign was terminated. In the final analysis, there is only one significant dispute about what had been said during that meeting. Smith said that she thought Ensign had been doing well, apparently given the fact that there had been no notice and tardiness problems since August, and asked what had happened that morning. Ensign testified that she had responded that her hands and arms had been numb and that Respondent's answering machine had malfunctioned when she had eventually attempted to call. Of course, as the prior disciplinary notices show, those refrains were not ones unfamiliar to Respondent. In contrast, Smith testified that Ensign replied that she had awakened with pain during the

middle of the night, had taken some medication to enable her to get back to sleep and, then, had overslept.

The reason written on Ensign's termination notice states, "She Called in at 5:26 to tell us she would be 15 minutes late. Company policy is to call in ½ hour before your shift starts. Kelly['s] shift started at 5:30," with the "**Type of Violation**" box above that was checked being "Attendance," rather than the boxes for "Lateness or early quit," for "Failure to follow instructions," or for "Violation of Company Policies and Procedures". Still, Ensign acknowledged that she was told during the meeting that she was being discharged for having failed to follow the 30-minutes call-in policy and for having been late several times.

Surprisingly, in light of her prior discipline, Ensign testified that she had told Smith and Conlin that "nobody else" calls in 30 minutes before their shift to report intention to be late. However, no evidence was adduced that would support such an assertion.

II. Discussion

In evaluating allegations of discrimination under the Act, the ultimate question which must be answered is the actual motivation for a respondent's allegedly unlawful actions. See, *Schaeff Incorporated*, 321 NLRB 202, 210 (1996), enfd., 113 F.3d 264 (D.C. Cir. 1997), and cases cited therein. More specifically at issue is the actual motivation of the official or officials who made decisions to take allegedly unlawful action. *Advanced Installations, Inc.*, 257 NLRB 845, 854 (1981), enfd. mem., 698 F.2d 1231 (9th Cir. 1982). "The state of mind of the company officials who made the decision … reflects the company's motive for" the allegedly discriminatory action. *Abilene Sheet Metal, Inc. v. NLRB*, 619 F.2d 332, 336 (5th Cir. 1980). In consequence, in the instant case, it is the motivation of Smith – the official who, so far as the evidence shows, made the decisions to terminate Rexroad, Riley and Ensign – upon which examination must focus.

To resolve the issue of Smith's motivations for those terminations, the analytical methodology to be followed is that set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd., 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), as modified in *Office of Workers' Compensation Programs v. Greenwich Colleries*, 512 U.S. 267, 276-278 (1994). That is, the General Counsel bears the burden of establishing that antiunion animus had motivated the employer's action. *Rose Hill Mortuary L.P. d/b/a Rose Hills Company*, 324 NLRB No. 75, fn. 4 (September 22, 1997). See also, *Schaeff Inc. v. NLRB*, 113 F.3d 264, fn. 5 (D.C. Cir. 1997).

Here, the record shows that each of the alleged discriminatees had engaged in activity in support of the Union's campaign to become that statutory representative of Respondent's employees. Among other activities, Rexroad served as the Union's observer during the representation election. Riley had spoken to other employees on behalf of the Union. Ensign had been one of the employees whose photograph and pro-Union statement appeared in the handbill distributed before the election. She also had periodically worn a shirt, bearing the Union's insignia, while at work.

Obviously, Respondent had been aware of Rexroad's service as the Union's election observer. In fact, that service had been a subject of two pre-election conversations between Rexroad and James Ayers, by then Respondent's president. Similarly, Respondent had to be aware of Riley's support for the Union. Despite his testimony that Riley had "professed that he was anti-union," Murdock conceded that he and another supervisor had reprimanded Riley

based upon reports by other employees that they were being harassed by Riley in his effort to generate support for the Union.

To conclude that Respondent had known of Ensign's appearance in the handbill, it is necessary to draw an inference to that effect. For, none of Respondent's officials admitted to having seen the handbill. No one testified to having given one of the handbills to any of Respondent's officials and supervisors. Indeed, no one testified to even having seen one of Respondent's officials or supervisors receive one of the handbills.

Similarly, Ensign never testified to having been seen by any particular official or supervisor while she had been wearing one of the shirts bearing the Union's insignia. No evidence was developed which can be said to show that any of Respondent's officials had actually seen Ensign wearing the shirt. Nor is the evidence sufficient to allow for an inference that the circumstances of her shirt-wearing, on any particular occasion or occasions, had been such that one or more of Respondent's officials or supervisors likely had seen her wearing the shirt. In that regard, it is undisputed that a number of Respondent's employees had worn such shirts while at work. Accordingly, it cannot be concluded that Ensign's shirt-wearing had been unique.

Still, Respondent's officials who testified never went so far as to deny altogether having known, or at least suspected, that Rexroad, Riley and Ensign had been supporting the Union. But such knowledge hardly suffices to establish the existence of unlawful motivation. As set forth above, the General Counsel must establish that antiunion animus had been the motivation. *Rose Hills Mortuary, supra*. Here, however, there is at best minimal evidence of such animus.

Riley claimed that, during his pre-election one-on-one meeting with her, Smith had asked if he had ever belonged to a union and, when he answered affirmatively, had asked how he had liked it. Further, Riley testified that, on the day after the election, he had been directed by Richard Ayers to report to the latter's office "first thing Monday morning," and who also had said twice to Riley "oh, what did you do."

The General Counsel has not alleged that any of those remarks constituted interference, restraint or coercion, within the meaning of Section 8(a)(1) of the Act. To conclude that interrogation, such as that attributed to Smith during her one-on-one meeting with Riley, violated the Act, it must be shown that the circumstances were such that the question, viewed by an objective standard, can be said to have been naturally interfering, restraining or coercive. Even though the General Counsel did move to amend the Complaint in another respect at the hearing's beginning, however, he did not move to add an unlawful interrogation allegation and, of course, none is included in the Complaint as issued.

As to the undisputed post-election remarks attributed by Riley to Richard Ayers, it should not escape notice that no remark attributed to Richard Ayers that day had been connected directly to the Union. That is, there is no direct evidence that statements to Riley that day had pertained to any activity on behalf of the Union.

True, the remarks by Richard Ayers had been made during the day immediately following the one during which a representation election had been conducted. To that extent, the timing is some indication that the election and Ayers's remarks were connected. Yet, the Union's campaign and the representation election did not occur in a total vacuum. The possibility that so ambiguous and vague remarks pertained to another subject must not be eliminated without some further examination.

On August 30 another employee's electric drill had turned up missing. It is undisputed that the drill ultimately had been found in Riley's truck. Murdock memorialized that discovery, characterizing Riley's action as "OUT RIGHT STEALING" in the memo. Discipline had not been pursued, Murdock testified, only because "I didn't have anybody to recommend to and we had the Union turmoil going on."

Of course, inasmuch as he did not appear as a witness, no one can say with any degree of certainty that Richard Ayers had been referring on October 5 to the suspected theft of the drill nor, for that matter, to any other particular incident. Even so, the General Counsel seeks to have an inference drawn that Ayers's remarks were connected to the election campaign. The drill incident provides at least one concrete example of another incident to which Ayers could have been referring. The existence of at least one other possible reason for those ambiguous remarks by Richard Ayers somewhat diminishes the facility with which the General Counsel argues that an inference must be drawn, connecting those October 5 remarks to the October 4 election, especially as Respondent had refrained from doing anything about the suspected theft because of the campaign in progress by late August. And that is not the only reason which detracts from readily drawing the inference sought by the General Counsel.

Although Riley did engage in union activity, and had once been reprimanded for assertedly having harassed other employees for doing so – a reprimand not alleged to have violated the Act – there has been no showing that Riley had been the leading, or a leading, activist on behalf of the Union: no showing that he had initiated its campaign, no showing that he had been instrumental in arranging for Respondent's employees to meet with it, no showing that he had been involved in securing authorization cards which supplied the Union's showing of interest. As a result, there is no basis for inferring that it would have been natural for Richard Ayers to have singled out Riley for some type of post-election chastisement.

In determining the existence or non-existence of discriminatory motivation, one factor scrutinized is the extent and nature of an alleged discriminatee's statutorily protected activity. See, e.g., *NLRB v. Alumina Ceramics, Inc.*, 690 F.2d 136, 139 (8th Cir. 1982); *NLRB v. Brookshire Grocery Co.*, 837 F.2d 1336, 1340-1341 (5th Cir. 1988); *Grocery Carts, Inc.*, 264 NLRB 1067 (1982); *United Broadcasting Company of New Hampshire, Inc., et al.*, 253 NLRB 697, fn. 1 (1980). Parallel analysis would appear to be applicable when evaluating whether or not an employer's ambiguous remarks pertained to an employee's union support and activities. Here, there is no showing that the extent and nature of Riley's support for, and activities on behalf of, the Union naturally would have led Respondent to single him out for some type of post-election chastisement. So far as the record shows, Riley had been no more than a run-of-the-mill union supporter who once had been reprimanded for harassing coworkers on the Union's behalf, but who had not done anything that would likely have led Respondent to believe that he had been a significant figure in the activities which had led to the representation election.

Two other points should not pass unnoticed. First, Respondent had won the election and nothing in the record shows that, as of October 5, its officials likely would have anticipated that objections would be filed. In consequence, viewed objectively, there would have been no basis for Richard Ayers to have prolonged the campaign situation by singling out one of the Union's non-prominent supporters for chastisement. Beyond that, there is no showing that any type of special or personal relationship had existed between Riley and Richard Ayers, such that it would have been natural for the latter to single out the former for chastisement about his support for a union.

Second, even be it assumed *arguendo* that Richard Ayers's remarks had been based upon Riley's union support and activities, his son who is president of Respondent, James Ayers, thereafter assured Riley that it was unnecessary to follow the senior Ayers's directive to report on Monday to the office. In fact, Riley never did go to the office of Richard Ayers on that Monday and, consistent with what he had been told by James Ayers, nothing adverse resulted from his not having done so.

Furthermore, if the ambiguous remarks by Richard Ayers are to be given any weight, then the directly Union-related remarks of President James Ayers cannot simply be ignored. As set forth in Section I.B., *supra*, James Ayers specifically assured Rexroad that there would be no retaliation after the election against the Union's supporters.

To be sure, animus, like motivation, can be inferred from circumstances which accompany a discharge. See, e.g., *Handicabs, Inc.*, 318 NLRB 890, 897 (1995), enfd., 95 F.3d 681 (8th Cir. 1996), and citation therein. And there are some objective factors present here which tend to support the Complaint's motivation allegations. For example, all three of the alleged discriminatees had been supporters of the Union. See, e.g., *Concepts & Designs*, 318 NLRB 948, 952 (1995), enfd., __F.3d___, 153 LRRM 2958 (8th Cir. 1996). Rexroad and Riley were fired ten days after the representation election and retaliation for past union support and activities is hardly a novel motivation. See discussion, *American Petrofina Company of Texas*, 247 NLRB 183, 190 (1980). See also, *Human Resources Institute*, 268 NLRB 790, fn. 2 (1984), and *Dayton Hudson Department Store Co.*, 324 NLRB No. 1 (July 1, 1987) (concern with renewal of a union's campaign.) Of course, were merit to be found to the objections, which should by October 14 have been filed, to comply with Board's Rules and Regulations, Section 102.69(a), another election would be directed and Respondent's position would naturally be strengthened by elimination of two union supporters.

Beyond that, it was my impression that, as he testified, Murdock was making some effort to fortify Respondent's case, by trying to enhance facts favorable to it and to diminish the effects of those which detracted from it, rather than being completely candid in describing what had taken place and what had been said. That is amply shown, for example, by a review of his testimony and memo regarding the contents of the bag which Riley had been carrying and what Riley had said about his reason for having left Respondent's facility, when the encounter at the pass door occurred, as described in Section I.D., *supra*. From that conclusion about Murdock's efforts to gild Respondent's lily, however, "it does not necessarily follow that the real reason [for the discharges] was grounded in antiunion animus." *Precision Industries*, 320 NLRB 661, 661 (1996). See also, *Society to Advance the Retarded and Handicapped, Inc.*, 324 NLRB No. 50, slip op. at 2 (August 22, 1997).

There is no basis for concluding that Murdock had been the official who had made any of the discharge decisions and Smith credibly testified that, in effect, she had independently reviewed each situation before having made her discharge decisions. In any event, much of Murdock's testimony is supported by objective considerations and appeared credible.

True, Smith had conferred with James Ayers before implementing her discharge decisions concerning Rexroad and Riley. Yet, such conferral, of itself, does not inherently warrant a conclusion that she had not been the official who had made those discharge decisions. At the same time, she also had conferred with counsel. As pointed out in Section I.C., *supra*, such conferral cannot be regarded, standing alone, of anything other than prudence, given the situation. The fact that Smith chose to do so is hardly an inherent indicium of unlawful motivation.

When she testified, Smith always appeared to be attempting to testify candidly about events which had led her to terminate Rexroad, Riley and Ensign. Moreover, a number of objective considerations tend to support her accounts of the events leading to each of those terminations and, conversely, tend to refute the explanations provided by those three alleged discriminatees.

Viewed objectively, it is entirely plausible that an employer would conclude that Rexroad was, at the very least, in the process of stealing end mills and calipers. As reviewed in Section I.C., *supra*, the end mills were discovered under the seat of his truck on October 14. To be sure, the calipers were still on Respondent's premises that day and, during the hearing, Rexroad agreed that they had belonged to Respondent. But, that was not what he had told Smith during the October 14 termination meeting.

As even the General Counsel's questioning of Smith appeared to concede, Rexroad had claimed to Smith on October 14 that the calipers belonged to Pierce. Pierce did not make that claim when she testified. Instead, she claimed that the calipers, in effect, belonged to Rexroad: that they had been purchased to replace ones owned by Rexroad and broken by her while working for Respondent. In short, at one time or another, both Rexroad and Pierce advanced stories about the calipers' ownership which were at odds with the now conceded fact that they belonged to Respondent. Of course, the fact that on October 14 Rexroad had said that the calipers belonged to Pierce, when Smith knew that they did not, hardly would engender confidence in any of the statements made that day by Rexroad.

It should be noted also that the entire process of Rexroad abruptly collecting the end mills and calipers from the tool room on October 10 would naturally heighten an employer's suspicion that he was intending to take them. Even if Pierce were to be credited – and her testimony about how the end mills and calipers came to be acquired is suspect in light of the lack of corroboration for it, the conflict with Rexroad as to who should be regarded as owner of the calipers, and her failure to explain why she had not purchased a set of end mills which she could use at the time when she supposedly had purchased end mills for everyone in the tool room – the end mills and calipers had remained in the tool room for slightly over a month after her termination, before Rexroad suddenly took them from there. If he truly had been using calipers in his work almost daily, as he claimed, then left unexplained is how he had gotten along without them while working from their purchase until October 10. Furthermore, he never claimed that he actually had been using the calipers from that latter date until October 14, when he was discharged. The absence of such evidence raises a further doubt as to reliability of his testimony, given the fact that the record shows only that he took the calipers from Lareau, but never thereafter used them in performing his maintenance duties.

Obviously, Rexroad was not using the end mills to perform any work on and after October 10. He had put them in his truck. He had not situated them in Respondent's facility nor in his tool chest, where they could have been used in performing his duties. Of course, he could not have put them in his tool chest. By October 10 he had wheeled that tool chest from Respondent's facility to his home. He claimed that he had done that because Pierce was no longer employed and borrowing his tools. Inconsistently, however, he claimed that he possessed personal tools on Respondent's premises to be used in performing his own duties. Consequently, it makes no sense for him to have removed his tool chest, and the personal tools in it, from Respondent's facility simply because Pierce no longer was working there – at least, not if Rexroad truly was intending to continue working for Respondent.

As of October 14 Rexroad had an unblemished work record. But, theft is grounds for immediate discharge under Respondent's disciplinary procedures. I reach no conclusion as to

whether or not Rexroad had stolen, or had been in the process of stealing, end mills and calipers. The only issue here is the legitimacy of Respondent's motivation. As to that, the totality of the circumstances reviewed above and set forth in Section I.C., *supra*, shows that it would not have been illogical for an employer to naturally believe that its property was being stolen. It is that conclusion which Smith testified credibly had led her to decide to terminate Rexroad.

Smith testified that she had made the decision to discharge Riley – for having walked off the job without notification to supervision and for timecard falsification, because he had not punched out – based upon facts related to her by Murdock. As pointed out above, when he appeared as a witness, Murdock appeared at points to be attempting to shore up Respondent's defense, rather than always testifying with complete candor. However, as to the basic facts which led to Smith's discharge, Murdock did appear to testifying with candor. That conclusion is supported by objective considerations. For, when considering Murdock's testimony about October 7, Riley's testimony about October 9 and certain other factors, the totality of that evidence supports the testimony which Murdock advanced and, conversely, undermines the explanation advanced by Riley.

In the first place, the fact that Riley punched out and back in during Wednesday, October 9 does not altogether preclude a conclusion that he had left Respondent's facility on Monday, October 7 during the workday. At best, mere timeclock entries for October 9 mean no more than that he also could have left Respondent's facility during that workday, as well. At worst, of course, it might mean that, having told Murdock on Monday that he had gone home to get his laundry, he then attempted to cover himself during any subsequent inquiry by trying to provide some objective support for the explanation which he had advanced.

Second, it seems clear that Riley had been carrying a bag of soiled uniforms when encountered by Murdock, returning to Respondent's facility. Of course, the laundry pick-up/delivery person comes to Respondent on Wednesdays and, to that extent, his carrying of that bag is some indication that the day of that encounter had been a Wednesday. Still, nothing in the record shows that employees do not bring their bags of soiled uniforms to Respondent's facility earlier in the week and, then, carry in additional soiled uniforms to add to the bag already there, thereby ensuring that bags of soiled uniforms are there should there be an unplanned absence on Wednesday. To be sure, there is no concrete evidence that Riley had actually done that during the workweek of October 7 through 11. Still, the following factors could naturally lead an employer to suspect the veracity of his explanation and, in fact, do lead to suspicion, at the very least, about the candor of his testimony.

Third, as set forth in Section I.D., *supra*, the back of his timecard shows that on October 9 Riley had punched out at "7.92" and had punched back in at "8 .03" – 11 one-hundreths of an hour, or slightly over six minutes, later." During that relatively brief period, Riley supposedly had gone to his car in the parking lot, driven to his nearby home, gone in and picked up the already bagged or needed-to-be-bagged soiled uniforms, returned to his car and driven back to Respondent's facility, left the car and walked to the pass door, spoke briefly with Murdock and, finally, went to the timeclock and punched back in. That is a seemingly significant number of actions in which to engage in little more than six minutes.

Fourth, the laundry person comes to Respondent's facility at around 8:00 a.m. In his memo – which appears to accurately recite what had occurred on the day that he encountered Riley returning to Respondent's facility, given its acknowledgment of the bag and of what Riley had said about the laundry – and when testifying, Murdock placed the time of his pass door encounter with Riley as having occurred at 8:45 a.m. Seemingly, that is a time by which the

laundry person would have left Respondent's facility, given the 45-minutes' earlier normal arrival and departure time. At least, there is no evidence that the laundry person ordinarily, or even on occasion, spends 45 minutes at Respondent on Wednesdays. In fact, as set forth in Section I.D., *supra*, Riley testified that when he had gone home, the laundry person had been getting ready to leave.

There is no basis for concluding that, when he prepared his memo, Murdock could have anticipated that there would be any timeclock recordings on the back of Riley's timecard for that week. Even Riley described Smith and Murdock as having been surprised on October 14 to discover those October 9 recordings on the back of his timecard, during the termination meeting. Accordingly, so far as the evidence discloses, Murdock had no reason to fabricate the time of his pass door encounter with Riley at the time of preparing the "10/10/96" memo. And since there is no basis for concluding that 8:45 a.m. had been an inaccurate time for the pass door encounter, it seemingly is not objectively plausible to conclude that Riley had been returning to Respondent's facility to turn over that same morning to the laundry pick-up/delivery person a bag of soiled uniforms.

Fifth, aside from Riley's timecard for the workweek of October 7 through 11, no timecards showing a practice of stamping out and in on their backsides were introduced, even though Counsel for the General Counsel mentioned, at the hearing's beginning, having obtained documents from Respondent by means of subpoena. Beyond that, Riley's and Foran's descriptions of the problem supposedly created by more than one timeclock punch during the same hour is refuted by examination of Riley's timecards which were produced. As set forth in Section I.D., *supra*, there are numerous instances on that limited number of timecards where Riley had punched out and back in during the same hour, with neither obliteration nor illegibility of any of the times recorded. Furthermore, Riley's September 5 timecard entries show that the timeclock can accommodate even more than two stamped entries during the same hour, without obliteration or illegibility of any of those recorded times.

In fact, the "7 .92" punch out and the "8 .03" punch in for October 9 represent times from different hours. So, the problem which Riley and Foran appear to have been trying to describe – punches during the same hour – would not seem to have pertained to those particular timeclock records. Nor can it be said that any such problem would have arisen naturally as a result of adding those two timeclock recordings to the others made on that same day for Riley. For, the face of the card shows that Riley had punched in at "3 .95" and had punched out for lunch at "11 .08." Neither the "7 .92" nor the "8 .03" recordings would have affected those much earlier and much later timeclock recordings, under the descriptions advanced by Riley and Foran. That is, seemingly none of the recordings on Riley's timecard for October 9 present a potential for obliteration or illegibility, under the supposed problem described by Riley and Foran.

The totality of the foregoing considerations tend to refute the assertion advanced by Riley that he had actually had left Respondent's facility during the workday on Wednesday, October 9 to retrieve soiled uniforms and, conversely, tend to support Murdock's account of having encountered Riley returning from the parking lot on Monday, October 7.

True, Smith testified that her motivation for terminating Riley had been that he had left during the workday both without clocking out and without supervisory permission, whereas only the not having clocked out reason was discussed during the October 14 termination meeting. But, in the circumstances of that meeting, such a seeming discrepancy evidences less an effort to fortify a defense and more the fact that the meeting took an unexpected turn before Smith could complete her own explanation to Riley during it.

Even under Riley's own account of that meeting, he appears to have interrupted Smith when she brought up his failure to have punched out on the day that he had left Respondent's facility during the workday. That interruption led Smith to leave the office to retrieve the timecard and, upon her return, to inspect the back of it as suggested by Riley. As discussed in Section I.D., *supra*, that inspection led to disclosure of the timeclock recordings on the backside of the card and, then, to Smith again leaving the office, this time to reflect upon the propriety of her termination decision in light of that decision. In the process, Riley's failure to have obtained supervisory permission to leave the facility appears to have dropped completely from focus, in light of the unplanned course which the meeting took as a result of Riley's interruption of it when the lack of a timeclock record was raised. As a result, Smith's failure to have specifically mentioned his concomitant failure to obtain supervisory permission to leave the facility is not so significant as might be the fact in different situations.

Much is made of the fact that Murdock's failure to have reported Riley's departure during the workday until Thursday, October 10, with the argument advanced that a three-day delay under his version indicates that Murdock is not being truthful about the actual day on which he encountered Riley at the pass door and, moreover, that a report to Smith on October 10 tends to confirm that Murdock had not encountered Riley at the pass door until October 9. But, as pointed out in Section I.D., *supra*, that delay is not so implausible, given the seeming credible explanation for it advanced by Smith and Murdock. In consequence, that 3-day hiatus is not so inherently fatal to Respondent's defense as is argued.

Much also is made of the fact that Respondent has failed to show that it previously regarded brief departures during the workday, without having clocked out and without having obtained supervisory permission, as "**Walking off Job**," within the meaning of its handbook's description. However, there is no objective basis for concluding that even a brief such departure could not fairly be characterized as walking off the job. The fact that Respondent may never have done so in the past, of itself, shows nothing meaningful when unaccompanied by some showing, not made here, of a prior instance where an employee had left during the workday, without clocking out and without supervisory permission, but was not discharged for "**Walking off Job**."

Turning to Ensign, many years ago, without subsequent retreat, the Board pointed out with respect to employee-absences, "Even where an employee may report the reasons for continued absence, or may have what appear to be justifiable excuses for such absences, an employer may well decide that an absence-prone employee is of no value to his business." *Maryland Cup Corp.*, 178 NLRB 389, 390 (1969). No different conclusion would seemingly apply to a tardy-prone employee who also repeatedly fails to give required advance notice of such tardiness, especially where the employer has notified all employees in its handbooks that both it and other workers "depend on each member playing his part on the team."

In fact, Ensign did report late for work on October 25. Her call to Respondent, notifying the latter that she would be late, had been received at a time even after the 15-minute deadline before the scheduled start of her shift at 5:30 a.m. and, of course, well after the 30-minute deadline in effect since April.

To be sure, on the third August notice issued to Ensign, Conlin had written that the deadline was "15 min". But, nothing shows that her written statement of the deadline had been other than inadvertence. Certainly a head of production or plant manager does not possess authority to countermand the deadline established by her employer, at least not so far as the record discloses. Moreover, Ensign did not deny having been aware of the 30-min. deadline in

effect since April and, significantly, never testified that, in having failed to call on October 25 more than 30 minutes before scheduled start of her shift, she had been relying upon what Conlin had written on the third August disciplinary notice which she (Ensign) had received. Indeed, it would have been ridiculous for Ensign to have done so. For, she admitted that she did not even attempt to begin calling Respondent until approximately 10 minutes before her shift was to start. Accordingly, her call was placed even after the deadline supplanted in April and stated by Conlin on the third disciplinary notice.

One of Ensign's explanations constituted a familiar refrain by October 25. On that day, she claimed, the phone had gone dead, after having made connection with Respondent, when she began calling at 5:20 a.m. That is an explanation quite similar to the ones made during August when she had claimed that there had been "no answer" to her calls to Respondent.

During August Ensign had been thrice disciplined both for having been tardy and for having failed to give the required 30-minutes advance notice of any of those tardinesses. Under Respondent's disciplinary procedure, a fourth "failure to notify in one calendar year" is disciplined with discharge. Ensign had been warned specifically in the third August disciplinary notice that "Dismissal" would result should there be another incident of tardiness with failure to give the required notice. As Smith pointed out during the termination meeting on October 25, Ensign had appeared to be improving after the August 14 third disciplinary notice. Yet, on that date, Ensign repeated the very infraction for which she had been warned that discipline would result and for which Respondent's policy specifies that discharge will result. To be sure, Smith might have selected a different box on the disciplinary notice of October 25, than the one which she chose, as described in Section I.E., *supra*. Still, an employer can hardly be charged with unlawful motivation solely because of a failure to select a perhaps better choice of several alternative boxes to check on a preprinted form. The fact is that the box which was chosen contained a discharge reason which applies to Ensign's work infraction.

There is no allegation that any of the August disciplinary notices issued to Ensign had violated the Act. The third notice warned that repetition would result in "Dismissal." Smith testified that she had reviewed Ensign's personnel file, containing those disciplinary notices, before having decided that Ensign's conduct on October 25 warranted discharge under Respondent's disciplinary policies. So, Smith testified credibly, that was the decision which she reached.

In sum, it would be difficult to conclude that Respondent had actually harbored animus toward the Union's supporters and activists, such that it could be inferred that such hostility likely would have motivated the discharges of Rexroad, Riley and Ensign. Even had that been the fact, discharges of even the most active of union supporters are not unlawful whenever those activists have engaged in misconduct which warrants discharge. See, e.g., *Koronis Parts, Inc.*, *supra*, 324 NLRB No. 119, slip op. JD at 38, and case therein cited. Here, Smith credibly testified that she believed that Rexroad had engaged in theft and that Riley had left during the workday without having clocked out and notified a supervisor that he was doing so. Moreover, it was obvious that Ensign had repeated the very infraction for which she already had been warned that repetition would result in "Dismissal." The totality of the evidence supports Smith's testimony and, conversely, undermines that explanations advanced by the alleged discriminatees. Therefore, I conclude that a preponderance of the credible evidence does not support any of the Complaint's allegations of unlawful motivation for their discharges.

Conclusions of Law

Central Illinois Manufacturing Co., Inc., an employer engaged in commerce and in a business affecting commerce, has not violated the Act in any manner alleged in the Complaint.

Upon the foregoing findings of fact and conclusions of law, and based upon the entire record and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[5]

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the find ings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

IT IS HEREBY ORDERED that the Complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. February 3, 1998

William J. Pannier III
Administrative Law Judge